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No. 80-931

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1980.

CHARLES D. BONANNO LINEN SERVICE, INC.,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD
AND
TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Charles D. Bonanno Linen Service, Inc.

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Question Presented.

Did the court below err in holding that an employer member of a multiemployer bargaining unit violates the National Labor Relations Act, 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(5), by unilaterally withdrawing from said unit upon the occurrence of an impasse in collective bargaining negotiations, for the purpose of negotiating individually with the union, and thereafter refusing to execute the multiemployer agreement, where such an opinion is contrary to the decision of five circuit courts of appeals on the same issue?

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Opinions Below.

The opinion issued by the court of appeals is reported at 630 F. 2d 25 (1st Cir. 1980), and is reproduced in Appendix A of the Petition for Certiorari. The Supplemental Decision and Order of the National Labor Relations Board was issued on August 6, 1979, is reported at 243 NLRB No. 140, and is reproduced in Appendix B of the Petition for Certiorari. The National Labor Relations Board's initial Decision and Order

was issued on June 29, 1977, is reported at 229 NLRB 629 and is reproduced in Appendix C of the Petition for Certiorari.

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered on September 12, 1980. On December 10, 1980, Charles D. Bonanno Linen Service, Inc. filed its Petition for Writ of Certiorari which was granted on March 9, 1981. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

Applicable Statutory Provisions.

The statute involved is the National Labor Relations Act, as amended, 61 Stat. 136, 713 Stat. 519, 29 U.S.C. § 151 et seq. The relevant sections are 29 U.S.C. § 158(a)(1) and (5). The pertinent text is as follows:

> § 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Statement of the Case.

On October 27, 1976, the parties agreed to stipulate to most of the essential facts which relate to the instant matter (J.A. 92-97, Jt. Ex. A, R. 16, 17).[1] Although the testimony adduced

[1] "P." references are to decisions printed in the Petition for Writ of Certiorari; "J.A." references are to portions of the record which are printed in the Joint Appendix.

at the hearing before the Administrative Law Judge revealed some disagreement as to details, there is no real disagreement as to the essential facts. The facts as recited herein were, in effect, adopted by the Administrative Law Judge during the course of his decision (P. 54-60) and were not disturbed in the subsequent proceedings.

Charles D. Bonanno Linen Service, Inc. (hereinafter "Bonanno") is a Massachusetts corporation and is engaged in the laundering, rental and distribution of linen, uniforms and related products (P. 54). The truckdrivers and helpers employed by Bonanno were represented by Teamsters Local Union No. 25, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter the "Union") (P. 55). Bonanno, in the past, had engaged in collective bargaining with the Union as a member of the New England Linen Supply Association (hereinafter the "Association"),[2] which was comprised of 10 employers engaged in the linen service business (P. 55). Bonanno and the other members of the Association each signed individual and identical agreements with the Union covering the period from September 21, 1972 to April 18, 1975 (P. 55).

In accordance with that agreement the Union and Association each gave notice of termination (J.A. 103, 104, Jt. Exs. 2, 3, R. 16, 17). Bonanno authorized the Association to bargain with the Union in its behalf (P. 56).

Commencing in March, 1975, the Association and the Union engaged in negotiations for a new agreement. After several negotiating sessions a proposed contract which provided for compensation of employees on an hourly basis was submitted to the Union membership for ratification. After the employees rejected that contract, the Union at the next

[2] The Association no longer exists. Bargaining between the Union and former Association members has been on an individual Company basis.

meeting proposed that its driver members be compensated on a commission basis rather than on an hourly rate. This position was rejected by the Association in accordance with its prior negotiating position. On May 15, as stipulated by the parties, an impasse in bargaining was reached over the issue of the method of compensating drivers (P. 56; J.A. 94, Jt. Ex. A, R. 16, 17).

On June 23, 1975, the Union called a selective strike against Bonanno and most of the remaining Association members locked out their drivers (P. 57). Subsequent meetings were held over the course of several months, but the parties were unable to resolve the continuing impasse (P. 56-57; J.A. 95, Jt. Ex. A, R. 16, 17).[3]

On November 21, 1975 Bonanno advised the Association and the Union that it was withdrawing from the Association (P. 58; J.A. 106, Jt. Ex. 4, R. 16, 17). Thereupon, the remaining members of the Association terminated the lockout (P. 59).[4]

After several meetings without Bonanno, the Association and Union reached an agreement on a new contract on April 13, 1976. By letter dated April 29, 1976, the Union for the first time informed Bonanno that it considered Bonanno to be bound by the agreement reached with the Association (J.A. 117, Jt. Ex. 7, R. 16, 17). By letter dated May 3, 1976, Counsel for Bonanno advised the Union that Bonanno was not bound by the agreement referred to in the Union's letter of April 29 (P. 60; J.A. 118, Jt. Ex. 8, R. 16, 17).

As a result of an unfair labor practice charge filed by the Union, the National Labor Relations Board (hereinafter "the

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[3] In testimony before the Administrative Law Judge evidence was adduced that the Union met separately with two individual members of the Association, "presumably in an effort to make a separate settlement" (P. 57). There is no record evidence that separate interim agreements were executed.

[4] The strike against Bonanno continued.

Board") summarily affirmed the decision of an Administrative Law Judge, holding that Bonanno violated § 8(a)(1) and (5) of the National Labor Relations Act ("the Act"), as amended, 61 Stat. 136, 140, 29 U.S.C. § 158(a)(1) and (5), by refusing to execute the collective bargaining agreement reached between the Association and the Union, 229 NLRB 629 (1977) (P. 70).

Thereafter, Bonanno applied for review and the Board applied for enforcement of its Order to the United States Court of Appeals for the First Circuit (Case No. 77-1279). After Bonanno had filed its brief, the Board filed, and the court granted, a motion for leave to withdraw the certified list filed in lieu of record in order to reconsider its decision. Subsequently, the Board on August 6, 1979 issued a Supplemental Decision adhering to the position taken in its earlier decision (P. 38).

The Board sought enforcement of its Supplemental Decision and Order with the Court of Appeals for the First Circuit. The court of appeals enforced the decision of the Board (P. 18).[5]

Summary of Argument.

While multiemployer bargaining has become an accepted method for the conduct of collective bargaining negotiations between a union and a confederation of employers, the salutary purposes achieved thereby are negated by the uneven application of the law by the National Labor Relations Board. The Board's rules respecting multiemployer bargaining are slanted against the employer. That form of voluntary bargaining is thereby rendered untenable to employers.

[5] On October 6, 1980 the First Circuit entered an order staying its decree until entry of the final decision of this Court upon a petition for writ of certiorari to be filed by Bonanno.

The Board held that Bonanno's refusal to execute the multiemployer agreement between the Association and the Union, subsequent to its withdrawal from the Association during an impasse in negotiations, was an unlawful refusal to bargain within the meaning of § 8(a)(5) of the Act. The Board maintains that an employer withdrawal, absent mutual consent, from a multiemployer group, after the commencement of negotiations, is ineffective unless justified by "unusual circumstances." "Unusual circumstances" are limited, by the Board, to two remote occurrences, namely pending bankruptcy or significant fragmentation of the group as a result of consensual withdrawals.

After taking diverse positions on the question of whether an impasse in negotiations is an "unusual circumstance," the Board now steadfastly maintains that an impasse is not an "unusual circumstance." Such a conclusion conflicts with a related postulate of law promulgated by the Board that the rules respecting multiemployer bargaining are to apply equally to unions and employers. But such evenhandedness is belied by the Board's sanction of a union's right to negotiate separate agreements with individual employer members of a multiemployer group. Such an unequal application of withdrawal rights does much to destroy the integrity of a multiemployer group and renders bargaining in such a framework futile, unattractive and meaningless.

Recognizing the Board's inflexible approach, five circuit courts of appeals have fashioned an "impasse doctrine" which sanctions an employer's right to withdraw upon the occurrence of an impasse in negotiations. This "impasse doctrine" adequately protects and balances the rights of all parties bargaining in a multiemployer context.

The Board's conclusion that an impasse in multiemployer bargaining is not an "unusual circumstance" does not comport with the realities of bargaining within that framework

and endangers the continued viability of multiemployer bargaining. By allowing a union to partially withdraw from multiemployer bargaining and negotiate a separate agreement, while refusing to allow employer withdrawal at impasse, the Board unfairly disturbs the delicate balance in favor of the union. Such a view negates the Board's ostensible equality of withdrawal standard, and involves the Board in the balancing of economic weapons contrary to this Court's decision in *NLRB* v. *Brown*, 380 U.S. 278 (1965). In addition, the sanctioning of a union's right to enter into separate interim agreements amounts to the rejection, at least in part, of the existence of the multiemployer unit.

The Board's characterization of an impasse as a "temporary deadlock" or "hiatus" ignores the dynamics of multiemployer bargaining. Unlike single employer-union negotiations, an employer in the multiemployer context is confronted, at impasse, not only with an adversarial union but also with a competitor employer member of the group who, having signed a separate agreement with the union, is engaged in productive work while the remaining employer members are enduring a strike. The result is a serious fracturing of the employer group and a breakdown of the uniform approach to collective bargaining contemplated by employers who voluntarily join a multiemployer group.

In order to effectuate the purposes of the Act, withdrawal at impasse should be allowed, so that the Board's policy of equalizing withdrawal rights of both parties is effectuated. Adoption of the "impasse doctrine" will have the salutary effect of insuring stability in collective bargaining. To do otherwise would frustrate meaningful collective bargaining because it requires an employer to remain indelibly tied to fruitless multiemployer bargaining long after that process of collective bargaining has ceased to function productively.

The decision of the First Circuit essentially held that the Board's decision was entitled to enforcement out of deference to its presumed expertise. As this Court has recognized, Congress intended that the courts of appeals serve a meaningful role in the development of our federal labor policy. It is submitted that the Board's refusal to find that an impasse in multiemployer bargaining constitutes an "unusual circumstance" rests upon an erroneous legal foundation. Conversely, the decisions of the five circuit courts, which have fashioned the "impasse doctrine," fairly balance the conflicting interests presented by the instant case. The "impasse doctrine," which allows employer withdrawal from a multiemployer bargaining unit upon the occurrence of an impasse in negotiations, should now be adopted by this Court.

Argument.

I. Withdrawal from Multiemployer Bargaining upon the Occurrence of an Impasse in Collective Bargaining Is Not Violative of the National Labor Relations Act.

A. *Introduction.*

Multiemployer bargaining has become an accepted method for the conduct of collective bargaining negotiations between a union and a confederation of employers. *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87, 94-96 (1957).[6]

The salutary purposes which may be achieved by this method of collective bargaining are well documented. Congress in its deliberations on the Taft-Hartley Act in 1947

[6] According to the United States Department of Labor in its study of collective bargaining agreements covering 1,000 or more employees, there are 648 multiemployer bargaining agreements, covering more than three million employees. United States Department of Labor, *Characteristics of Major Collective Bargaining Agreements, January 1, 1978*, 12 (Bulletin 2065, April, 1980).

recognized the utility of bargaining on this basis when a proposal to ban industry-wide bargaining was rejected.

This Court too has had occasion to examine, and approve, the virtues of multiemployer bargaining. Thus, in *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87 (1957), the court concluded that multiemployer bargaining offers advantages to both management and labor. Such a mechanism for bargaining allows an employer to bargain "on an equal basis with a large union" and to avoid "the competitive disadvantages resulting from nonuniform contractual terms." *Id.* at 96. Moreover, multiemployer bargaining permits the union and employer to marshall their resources with a view toward the negotiation of a single collective bargaining agreement. As a result, the process is, in the main, more effective and efficient and industrial discord is reduced. This Court has therefore concluded that multiemployer bargaining is a "vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *Id.* at 95.

Yet, under the present state of the law as promulgated by the National Labor Relations Board the future of multiemployer collective bargaining is seriously threatened. The Board's uneven application of its rule respecting multiemployer bargaining whereby it refuses to sanction employer withdrawal from multiemployer bargaining upon the occurrence of an impasse in bargaining, if allowed to stand, will undermine an employer's voluntary determination[7] that such a forum for bargaining is in its best interest. Multiemployer units are created upon the voluntary consent of the parties. If employers perceive that the Board's rules respecting multiemployer bargaining are slanted, they will be reluctant to enter into such a consensual arrangement.

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[7] *Tennessee Consolidated Coal Co.*, 187 NLRB 821 (1971).

Conversely, the "impasse doctrine," fashioned by five courts of appeals,[8] which allows withdrawal upon an impasse in bargaining, fairly protects the interests of both parties to multiemployer bargaining and insures that the guidelines established by the Board will be uniformly applied. Approval of this doctrine will insure the continued viability of multiemployer bargaining.

B. *The Position of the Board on Withdrawal from Multiemployer Bargaining.*

The Board's conclusion that Bonanno's refusal to execute the collective bargaining agreement executed between the Union and the Association violated the Act was grounded on its view that Bonanno's withdrawal was ineffective (P. 51).

In *Retail Associates*, 120 NLRB 388 (1958), the Board established the rules governing withdrawal rights of parties to multiemployer bargaining units. Simply put, once negotiations between the multiemployer group and the union have commenced, neither party may withdraw unless by mutual consent or unless "unusual circumstances" otherwise excused the untimely withdrawal. 120 NLRB at 394.[9]

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[8] *NLRB* v. *Independent Association of Steel Fabricators*, 582 F. 2d 135 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979); *NLRB* v. *Beck Engraving Co., Inc.*, 522 F. 2d 475 (3d Cir. 1975); *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F. 2d 181 (5th Cir. 1974); *Fairmont Foods Co.* v. *NLRB*, 471 F. 2d 1170 (8th Cir. 1972); *NLRB* v. *Associated Shower Door Co., Inc.*, 512 F. 2d 230 (9th Cir. 1975), *cert. denied*, 423 U.S. 893 (1975).

[9] Prior to its decision in *Retail Associates*, the Board espoused a rule quite different from the one it now seeks to impose. *Association of Motion Picture Producers, Inc.*, 88 NLRB 1155 (1950); *Johnson Optical Co.*, 87 NLRB 539 (1949). In *Morand Brothers Beverage Co.*, 91 NLRB 409 (1950), *enf'd*, 190 F. 2d 576 (7th Cir. 1951), the Board held that "employers [have] unlimited freedom unilaterally to fashion the scope of, or to completely destroy multiemployer bargaining at their will or fancy." *Id.* at 418. A concomitant right was also recognized as being reposed in a union.

The scope of the term "unusual circumstances" was not defined by the Board in its *Retail Associates* decision. Subsequent Board decisions further clouded the issue by initially implying that an impasse in bargaining was not an "unusual circumstance," *Teamsters Local 717* (Ice Cream Council), 145 NLRB 865 (1964), only to later suggest the opposite conclusion. *Plumbers and Steamfitters Local 323* (PHC Mechanical Contractor), 191 NLRB 592 (1971). See *NLRB* v. *Bonanno*, 630 F. 2d 25, 35 (1st Cir. 1980) (P. 24).

In *We Painters, Inc.*, 176 NLRB 944 (1969), the Trial Examiner, affirmed by the Board, held that unilateral withdrawal by an employer after impasse must be unequivocal and accompanied by notice of the union.

> An impasse in bargaining having been reached, a withdrawal of bargaining authorization [from the multiemployer group] would in my opinion have been timely. 176 NLRB at 965.

In *Atlas Sheet Metal Works, Inc.*, 148 NLRB 27 (1964), bargaining between the employer's group and the union had reached an impasse. Thereafter the employer notified both the union and the employer's group that it was withdrawing from multiemployer bargaining. The union did not object either to the withdrawal or to the fact that the employer's representative was resigning from the group's bargaining committee and was being replaced. The Board upheld the employer's unilateral withdrawal from multiemployer bargaining after an impasse had been reached.

In *Tulsa Sheet Metal Works, Inc.*, 149 NLRB 1487 (1964), the Board clearly indicated approval of unilateral withdrawal from multiemployer bargaining upon impasse:

> When group bargaining is the pattern, while it is not presumed that the identity of each individual employer participant becomes merged into a single group identity

> to the extent that, in all circumstances, its freedom to condition or delimit its acceptance of the final bargaining product is forfeited, *its freedom to withdraw while group negotiations are in progress must, of necessity, be severely circumscribed, and normally would require it to bargain only through its designated bargaining agent in good faith to a point of agreement or impasse,* foreclosing full exposure of remaining issues to the moderating influences of the bargaining table. 149 NLRB at 1500 (emphasis added).[10]

While the Board has recognized that certain "unusual circumstances" may require a balancing of competing interests thereby allowing an employer to withdraw after the commencement of negotiations, it has severely limited those instances where withdrawal will be sanctioned. Withdrawal is allowed by the Board in but two instances. Where an employer can demonstrate that it is faced with dire economic circumstances, such as impending bankruptcy, withdrawal from group bargaining will not violate the Act. *U.S. Lingerie Corporation,* 170 NLRB 750, 751 (1968); *Spun-Jee Corp.,* 171 NLRB 557, 558 (1968). The only other situation which constitutes "unusual circumstances," in the Board's view, is where the multiemployer group has been significantly fragmented as a result of consensual withdrawals. *Connell Typesetting Company,* 212 NLRB 918, 921 (1974); *Typographic Services Co.,* 238 NLRB 1565 (1978).

Bonanno withdrew from the Association more than six months after the onset of an impasse in negotiations, and after enduring a prolonged strike. These facts squarely raise the issue as to whether an employer is justified in withdraw-

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[10] See also *Iron Workers, Local 103,* 195 NLRB 980 (1972), wherein the Board strongly implied that once an impasse is reached in negotiations, an employer may withdraw from multiemployer bargaining without the consent of the union.

ing from group bargaining once an impasse in negotiations is reached under the standard set forth by the Board in its *Retail Associates* decision.

The Board resolved its seemingly contradictory cases (compare *Teamsters Local 717* (Ice Cream Council), 145 NLRB 865 (1964), with *Plumbers and Steamfitters Local 323* (PHC Mechanical Contractors), 191 NLRB 592 (1971)) on the question of whether an impasse in negotiations constitutes an "unusual circumstance" in *Hi-Way Billboards, Inc.*, 206 NLRB 22 (1973), *enforcement denied*, 500 F. 2d 181 (5th Cir. 1974). In *Hi-Way Billboards* the Board concluded that an impasse in bargaining was not an "unusual circumstance," and therefore employer withdrawal from multiemployer bargaining at that time was not justified. The Board based its finding on its view that an "impasse cannot be said to be an unexpected, unforseen, or unusual event in the process of negotiations." *Hi-Way Billboards*, 206 NLRB at 23. Rather, an impasse was characterized as a temporary "deadlock" or hiatus in negotiations.

Under its *Hi-Way Billboards* decision, the Board found Bonanno's withdrawal from the Association to be ineffective. Therefore its refusal to execute the collective bargaining agreement agreed to between the Union and the Association was, in the Board's opinion, violative of § 8(a)(5) of the Act (P. 41).[11]

It is submitted that the Board's rule prohibiting employer withdrawal at impasse contravenes two related policy decisions it has applied to multiemployer bargaining. The first line of cases articulates a policy that there should be equality of withdrawal rights. *Pacific Coast Association of Pulp and Paper Manufacturers*, 163 NLRB 892 (1967); *The Evening*

[11] It should be pointed out that by withdrawing from the Association Bonanno did not intend to extinguish its then existing bargaining obligation. Rather, Bonanno only intended to negotiate on an individual basis directly with the Union (J.A. 106, Jt. Ex. 4, R. 16, 17).

News Association, 154 NLRB 1494, 1496-1497 (1965), *enf'd sub nom. Detroit Newspaper Publishers Association v. NLRB,* 372 F. 2d 569 (6th Cir. 1967). The second related principle enunciated by the Board authorizes a union, after commencement of negotiations, to partially withdraw from multiemployer bargaining by entering into separate interim agreements with one or more employer members. At the same time, the union is allowed to insist on negotiating with the remaining employers in the multiemployer unit on a group basis. See, e.g., *Plumbers and Steamfitters Local 323* (PHC Mechanical Contractors), 191 NLRB 592 (1971); *Sangamo Construction Co.,* 188 NLRB 159 (1971).

With respect to equal treatment of both employers and unions who are party to multiemployer bargaining, the Board's egalitarian view is clearly stated in *Evening News Association,* 154 NLRB 1494, 1496 (1965), as follows: "In principle there is no basis for different treatment of union and employer withdrawals from multi-employer bargaining units." Yet, the Board has not adhered to the evenhanded principle it laid down in *Evening News Association.* Rather, it has created an imbalance by allowing a union to engender a partial or *de facto* withdrawal from multiemployer bargaining. Thus, the Board sanctions a union's right to enter into separate agreements with individual employers while requiring that other employers must continue to bargain as part of the multiemployer unit. The Board contends that such agreements may prevent significant unit fragmentation rather than cause it and do tend to facilitate the breaking of impasse.[12] *Charles D. Bonanno Linen Service, Inc.,* 243 NLRB No. 140 (1979) (P. 51). As will be examined in more

[12] The question might be asked why, if that is true, permitting one of the members of the group to withdraw after a lengthy impasse and to bargain separately might not equally serve the same purpose.

detail, such a conclusion does not comport with the realities of multiemployer bargaining.

As illustrated, the Board has engaged in substantial regulation of multiemployer bargaining. While professing a desire to devise rules that will apply uniformly to all parties, the Board has steadfastly held to its position that an impasse in bargaining will not justify withdrawal by an employer from a multiemployer bargaining group. This inflexible position tends to weaken the process of collective bargaining, and seriously interferes with the national labor policy of promoting industrial peace through effective collective bargaining. The stability of multiemployer bargaining is rendered suspect by the Board's slavish adherence to the rules respecting withdrawal rights of the parties. While unions are free to abandon multiemployer bargaining at a critical moment, employers must, under the Board's postulation of the law, remain wedded to the multiemployer group under the same circumstances. Such an unequal policy does much to destroy the integrity of multiemployer bargaining and makes this vehicle for bargaining far less attractive to employers considering entering into, or continuing in, such a framework for collective bargaining in the future.

C. *The Fashioning of an "Impasse Doctrine" by Five Courts of Appeals.*

As a result of the Board's inflexible approach, five circuit courts of appeals[13] have fashioned an "impasse doctrine" holding that an impasse in multiemployer bargaining con-

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[13] In prior decisions the First Circuit indicated approval of the "impasse doctrine." In *NLRB* v. *Field and Sons, Inc.*, 462 F. 2d 748 (1st Cir. 1972), the Board sought enforcement of an order against the employer for violation of § 8(a)(1) and (5) of the Act for refusing to sign a collective bargaining agreement negotiated by a multiemployer bargaining association from which the employer had resigned one week prior to the execution of the collective bargaining agreement. While denying enforcement of the Board's order on procedural grounds, the court stated that, "we do not see

stitutes an "unusual circumstance" within the meaning of the Board's *Retail Associates* decision. *NLRB* v. *Independent Association of Steel Fabricators, Inc.*, 582 F. 2d 135 (2d Cir. 1978); *NLRB* v. *Beck Engraving Company*, 522 F. 2d 475 (3d Cir. 1975), *cert. denied*, 439 U.S. 1130 (1979); *NLRB* v. *Associated Shower Door Co., Inc.*, 512 F. 2d 230 (9th Cir. 1975), *cert. denied*, 423 U.S. 893 (1975); *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F. 2d 181 (5th Cir. 1974); *Fairmont Foods Co.* v. *NLRB*, 471 F. 2d 1170 (8th Cir. 1972); but see *NLRB* v. *Bonanno Linen Service, Inc.*, 630 F. 2d 25 (1st Cir. 1980) (P. 18). In each of these cases, the courts have concluded that a negotiating impasse justifies unilateral withdrawal from a multiemployer bargaining unit. *NLRB* v. *Independent Association of Steel Fabricators, supra* at 146; *NLRB* v. *Beck Engraving, supra* at 482-483; *NLRB* v. *Associated Shower Door, supra* at 232; *NLRB* v. *Hi-Way Billboards, supra* at 183-184; *Fairmont Foods* v. *NLRB, supra* at 1172-1174 n.1.

The first opportunity for judicial review of the Board's rejection of impasse as an "unusual circumstance" came in *Fairmont Foods Co.* v. *NLRB*, 471 F. 2d 1170 (8th Cir. 1972). In that case, the Court of Appeals for the Eighth Circuit considered the issue as to whether a valid impasse justified the employer's unilateral withdrawal from group bargaining and stated:

> When an impasse in negotiations is reached, withdrawal by a member of a multiemployer bargaining

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why an undertaking to engage in multi-employer bargaining is an irrevocable agreement under all circumstances." *Id.* at 750. And in *Jaime Andino d/b/a Jaime Andino Trucking* v. *NLRB*, 619 F. 2d 147, 151 (1st Cir. 1980), the First Circuit, citing *Carvel Co.* v. *NLRB*, 560 F. 2d 1030, 1035 (1st Cir. 1977), and *Fairmont Foods Co.* v. *NLRB*, 471 F. 2d 1170, 1172-1173 (8th Cir. 1972), while finding that no impasse had been reached, stated that an impasse is an unusual circumstance justifying withdrawal, *supra* at 151.

> group is excused. *See* Morand Bros. Beverage Co., 91 N.L.R.B. 409, 26 L.R.R.M. 1501, 1506 (1950), enforced, 190 F. 2d 576 (7th Cir. 1951); *cf.* Ice Cream Council, Inc., 145 N.L.R.B. 865, 870, 55 L.R.R.M. 1059, 1061 (1964). This means, of course, that it cannot be bound by a subsequent agreement between a union, having knowledge of the withdrawal, and the other employers. *Id.* at 1172-1173.

The court went on to say that "[b]ecause an impasse had been reached, Fairmont's withdrawal was timely. It therefore was not a violation of 8(a)(5) and (1) of the Act to refuse to be bound by an agreement reached by the Union and the multiemployer group after withdrawal with the Union's knowledge." *Id.* at 1173. Thus, in essential terms, it may be said that *Fairmont Foods, supra,* stands for the proposition that a member of a multiemployer unit may withdraw from that bargaining unit when an impasse is reached in negotiations.

NLRB v. *Hi-Way Billboards, Inc.,* 473 F. 2d 649 (5th Cir. 1973) deals directly with the issue of whether an employer may unilaterally withdraw from group bargaining because of an impasse in negotiations.

On a petition for enforcement of the Board's bargaining order, the court concluded that a "genuine impasse in the bargaining was reached by the Association and the Union immediately prior to the Company's withdrawal from the multiemployer bargaining unit," 473 F. 2d at 655, and remanded the case to the Board "so that it may be given the first opportunity to decide whether an impasse such as found here excuses the Company from withdrawing from the multiemployer bargaining unit." *Id.* at 655.

On remand, 206 NLRB 22 (1973), the Board discussed the issue of impasse and concluded for the first time that "an employer may not unilaterally withdraw from a multi-

employer bargaining unit solely because an impasse in negotiations has been reached." *Id.* at 22. The Board then cited *Retail Associates, supra,* as controlling and held that "a genuine impasse in negotiations between a union and a multi-employer bargaining association does not constitute an 'unusual circumstance' within the meaning of that term as applied by us in cases subsequent to *Retail Associates.*" *Id.* at 23. The Board went on to reaffirm its original order.

The Board once again petitioned the U.S. Court of Appeals for the Fifth Circuit for enforcement of its order. *NLRB* v. *Hi-Way Billboards, Inc.,* 500 F. 2d 181 (5th Cir. 1974). In denying enforcement of the Board's order, the court of appeals discussed the essential inequality of bargaining rights that has resulted from the uneven application of the Board's rules governing withdrawal from multiemployer bargaining. The court concluded that the union had an unfair advantage in multiemployer negotiations by reason of the fact that the Board permitted unions to enter into an agreement with one member of an employers' association and then to whipsaw the remaining members of the multiemployer bargaining unit. The court determined that "enforcement of the Board's order would be unfair to the Company." *Id.* at 184.

The next case to discuss this issue was *NLRB* v. *Associated Shower Door Co., Inc.,* 512 F. 2d 230 (9th Cir. 1975), *cert. denied,* 423 U.S. 893 (1975). The facts, stated briefly, are as follows: During the course of negotiations over a new contract, the multiemployer bargaining association and the union reached an impasse. The union then notified the association that it was going to strike. Subsequently, the company informed the association that it was withdrawing, but did not inform the union of the withdrawal. Two weeks later, the company sent telegrams to both the association and the union stating that it was withdrawing from the association. Shortly thereafter the union informed the association that it

was not accepting the company's withdrawal. The union then sent a letter to the company stating that it did not consent to its withdrawal from multiemployer bargaining and that the company would be bound by any agreement entered into by the association and the union. The company continued its participation in the multiemployer negotiations. An agreement was reached between the association and the union, but the company refused to comply with said contract, relying upon its purported withdrawal from the association.

In its decision reviewing the Board's finding of a § 8(a)(5) violation, the Ninth Circuit addressed itself to the Board's position that the company's withdrawal was ineffective because once collective bargaining involving a multiemployer unit has begun, neither the employer group nor an individual employer nor the union may withdraw from such bargaining without the consent of the opposing party, absent unusual circumstances. In adopting a position contrary to that of the Board, the court reasoned as follows:[14]

> The Board has held that a union which has commenced collective bargaining with a multi-employer unit may withdraw from the multi-employer unit with respect to one or more employers while continuing multi-employer bargaining with those employers remaining in the multiple unit. Pacific Coast Association of Pulp and Paper Manufacturers, 163 N.L.R.B. 892, 895-896 (1967). Since the Board has committed itself to preserving the equality of withdrawal rights in the multi-employer unit situation, *see* The Evening News Association, 154 N.L.R.B. 1494,

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[14] The court, however, ordered enforcement of the Board's order on the grounds that though the employer's withdrawal was effective when tendered, the subsequent conduct of the parties (i.e., participating in further multiemployer negotiations) constituted a retraction of the withdrawal and a reestablishment of the bargaining unit.

> 1495-1497 (1965), enforced sub. nom. Detroit Newspaper Publishers Association v. NLRB, 372 F.2d 569, 572 (6th Cir. 1967), it seems only fair that, when an impasse is reached and a union then engages in selective picketing and enters into substantial individual agreements with employers who had been members of the multi-employer unit, the withdrawal of the remaining members of the unit, if unequivocally communicated, should be permitted. [Citations omitted.]
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> *Were the rule otherwise, a union could reach an agreement with one or more employers and then whipsaw the remaining members of the significantly fragmented and weakened multi-employer unit.* [Citations omitted.] Here the Companies were entitled to, and did by clear written notice, withdraw from the Association. *Id.* at 232 (emphasis added).

The Third Circuit has also concluded, on facts substantially similar to those in the instant case, that once an impasse in multiemployer bargaining has been reached, withdrawal is allowed. *NLRB* v. *Beck Engraving Co., Inc.*, 522 F. 2d 475 (3d Cir. 1975). The specific issue addressed by the Third Circuit was whether an impasse in contract negotiations is an "unusual circumstance" which justified the withdrawal of a company from a multiemployer bargaining association. The Board argued, in accordance with its recent decisions, that the "unusual circumstances" exception should be limited to two situations: (1) extreme financial hardship threatening the existence of the employer as a viable business entity; and (2) fragmentation or dissipation of the multiemployer bargaining unit. The Board contended that neither of these situations existed in the *Beck* matter. The court did not agree with the Board's contention, and concluded that the "unusual cir-

cumstances" exception should not be so limited. In so concluding, the *Beck* court reasoned as follows:[15]

> As we have noted, the Board has enunciated the even-handed principle that its regulations for withdrawal from multi-employer bargaining units are the same for unions and employers. *The Evening News Association, supra,* 154 N.L.R.B. at 1501 (1965). Its subsequent decisions have reflected an effort to effectuate this policy. For example, the Board has held in a series of opinions that a union may withdraw from a multi-employer bargaining unit with respect to one or more, but not all, employers if the withdrawal is timely and unequivocal. *Pacific Coast Association,* 163 N.L.R.B. No. 129, pp. 892-899 at 896 (1967); *Hearst Consolidated Publications, Inc.,* 156 N.L.R.B., No. 16, 210, 212 (1965) enforced *sub nom., Publishers' Association of New York City v. NLRB,* 364 F.2d 293 (2d Cir.), cert. denied 385 U.S. 971, 87 S.Ct. 509, 17 L.Ed.2d 435 (1966); *The Evening News Association,* 154 NLRB No. 121, 1494, 1501 (1965), enforced *sub nom., Detroit Newspaper Publishers Association v. NLRB,* 372 F.2d 569, 572 (6th Cir. 1967). In substance, these cases merely apply the *Retail Associates* rule, *supra,* 120 NLRB 393-395, to the union as well as the employer.
>
> But the Board has not contented itself with this approach. Instead, it has given its imprimatur to the union's negotiation of interim, separate agreements with individual members of the multi-employer bargaining unit. *P.H.C. Mechanical Contractors,* 191 NLRB No. 121, pp. 592-596 (1971); *Sangamo Construction Company,* 188 NLRB No. 26, 159-163 (1971). *The undeniable import of this policy is that the union may reach*

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[15] *NLRB* v. *Beck Engraving Co., Inc.,* 522 F. 2d 475, 482-483 (3d Cir. 1975).

agreements with one or more employers of the bargaining unit and then whipsaw the remaining employers of the bargaining unit.

It is not sufficient to say, as the Board does, that such an arrangement does not preclude an individual employer from reaching an individual and interim accord with the union. Rather, the point is that each individual agreement strengthens the union's hand vis-a-vis those employers who continue to bargain within the unit. Moreover, allowing individual negotiations even on an interim basis is tantamount to a rejection of the existence of the multi-employer bargaining unit. *We believe it inconsistent to say that the union and some employers may act on an individual basis while other employers within the same unit, relegated to this posture by the union's refusal to negotiate with them on an individual basis, must adhere to group bargaining.* The union, under the Board's own policy, should not have been given two weapons for its economic arsenal (i.e., the selective strike and individual negotiations) while the employers are given only one (viz., the lockout). *We believe that the Board's approval of individual, interim agreements during multi-employer bargaining and without requiring withdrawal from the multi-employer bargaining unit is sufficient cause for according the employer an equivalent right.* See *Fairmont Foods Co. v. NLRB, 471 F.2d 1170 at 1174, n.1 (8th Cir. 1972). Moreover, the Board's decisions and its stated policy of applying its rules equally to both Union and employer require us also to conclude that a negotiating impasse justifies an employer's unilateral withdrawal from the multi-employer bargaining unit.*

We, therefore, join the Ninth, Fifth, and Eighth Circuits and hold that a negotiating impasse justifies unilateral withdrawal from a multi-employer bargaining

unit, *NLRB v. Associated Shower Door Co., Inc.*, 512 F.2d 230 at 232 (9th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3062 (U.S. July 23, 1975) (No. 75-127); *NLRB v. Hi-Way Billboards, Inc.*, 500 F.2d 181 at 183-184 (5th Cir. 1974); . . . *Fairmont Foods Co. v. NLRB, supra* at 1172-1173 and 1174, n.1. (Emphasis added.)

In *NLRB* v. *Independent Association of Steel Fabricators, Inc.*, 582 F. 2d 135 (2d Cir. 1978), the Board, on appeal to the Second Circuit for enforcement of its bargaining order, argued essentially that no impasse existed when the employer withdrew from multiemployer bargaining. The Board further argued that an impasse in bargaining is merely a "hiatus in negotiations" and is not such an unusual circumstance within the meaning of its *Retail Associates, supra,* decision. The court, joining the four other circuit courts which had decided the issue, disagreed with the Board, holding that an impasse was in fact present, and such an impasse constitutes special circumstances justifying an employer's withdrawal from multiemployer bargaining. In so doing the court recognized the substantial deleterious effect the unchecked power of a union to negotiate individually with members of a multiemployer unit has on the continuing viability of the multiemployer group. Absent the employer's concomitant ability to withdraw from multiemployer bargaining upon impasse, the court adeptly pointed out the adverse consequences on the multiemployer unit which follow when the union engages in individual bargaining. "[I]ts [the union's] willingness to negotiate separately with several members had something of a whipsaw effect on the remaining members who watched certain of their withdrawing competitors resume business while they themselves were still in the throes of an economic strike." 582 F. 2d at 147.

The Second Circuit therefore joined the four other circuit courts in holding that an impasse in bargaining constitutes such an unusual circumstance as to justify unilateral with-

drawal by an employer from a multiemployer unit. In reaching this conclusion the Second Circuit said:

> In this circuit, we have never directly ruled on an actual impasse situation as it affects the withdrawal rights of a member of a multi-employer bargaining unit. . . . The policy considerations involved are easy to formulate but difficult to reconcile. The rule against untimely withdrawal is designed to preserve the stability of multi-employer bargaining which would be impaired if an employer could withdraw whenever it found the results of such bargaining uncongenial or if it felt that it could use the threat of withdrawal as bargaining leverage. *See N.L.R.B. v. Sheridan Creations, Inc., supra,* 357 F.2d at 248. By the same token, however, the objectives of collective bargaining would be ill-served by compelling employers to remain in the bargaining unit once it becomes clear that no progress is being made within that framework. Thus, all the circuits which have addressed the issue have concluded that a genuine impasse in negotiations will justify an employer's unilateral withdrawal from multi-employer bargaining. 582 F.2d at 146 (citations omitted).

A recent decision of the Ninth Circuit, on the issue, was rendered in *H & D, Inc.* v. *NLRB,* — F. 2d — (9th Cir. October 8, 1980). In this decision the court adhered to its earlier holdings that an impasse in bargaining justifies employer withdrawal. The court stated:

> Recently, this court declared in *Authorized Air Conditioning Co.* v. *NLRB,* 606 F. 2d 899 (9th Cir. 1979), citing cases from the Second, Third, Fifth, Eighth and Ninth Circuits, that "[t]he Courts of Appeals have consistently recognized an impasse in negotiations as justification for a unilateral withdrawal from a multi-employer

unit." 606 F. 2d at 907. While the Board argues on this appeal that its position, considering the competing policy decisions is compelling and entitled to judicial acceptance, and that in recent cases the courts' misconceptions of the Board's rulings have been clarified, these contentions are not persuasive and appear to be disposed of in *NLRB* v. *Associated Shower Door Co.*, 512 F. 2d 230, 232 (9th Cir. 1975), and *NLRB* v. *Beck Engraving Co.*, 522 F. 2d 475 (3d Cir. 1975). We find no cogent reason at this time to challenge the position taken by this court in *Authorized Air Conditioning Co.* v. *NLRB, supra* at 907-908.

Thus, all of the courts of appeals which have considered the question, with the notable exception of the First Circuit, have concluded that the Board's refusal to view an impasse as an "unusual circumstance" is unsound. Rather, these courts have fashioned an impasse doctrine which adequately protects the rights of all parties bargaining in a multiemployer context. Just as the Board originally granted a union the right to withdraw after an impasse in bargaining in order to give it equal rights *vis-a-vis* the employer, *Morand Brothers Beverage Co.*, 91 NLRB 409 (1950), *enf'd*, 190 F. 2d 576 (7th Cir. 1951), the judiciary, with the exception of the First Circuit, has found it necessary, in balancing the equities, to grant the employer the right of withdrawal at impasse, to insure equality vis-a-vis the union. See *NLRB* v. *Bonanno*, 630 F. 2d 25, 30 n.7 (1st Cir. 1980) (P. 26).

D. *The Labor Board's Notion that an Impasse in Bargaining Is Not an "Unusual Circumstance," as Enforced by the First Circuit, Is Not Supported by the Realities of Multiemployer Bargaining.*

The Board's view, as supported by the First Circuit below, that an impasse is not an "unusual circumstance" under its

Retail Associates decision does not comport with the realities of multiemployer collective bargaining, and has the practical effect of jeopardizing the viability and effectiveness of bargaining on a group basis. While the Board professes a desire to apply its rules regarding withdrawal equally to employers and unions, *The Evening News Association*, 154 NLRB 1494 (1965), *enf'd sub nom. Detroit Newspaper Publishers Association* v. *NLRB*, 372 F. 2d 569 (6th Cir. 1967) *Hearst Consolidated Publications, Inc.*, 156 NLRB 210 (1966), *enf'd*, 364 F. 2d 293 (2d Cir. 1966), *cert. denied*, 385 U.S. 971 (1966); *Pacific Coast Association*, 163 NLRB 892 (1967), equal treatment is denied by the Board's sanction of a union's right to negotiate separate interim agreements with individual employer members of a multiemployer group. *Sangamo Construction Co.*, 188 NLRB 159 (1971); *Plumbers and Steamfitters Union No. 323* (P.H.C. Mechanical Contractors), 191 NLRB 592 (1971). Moreover, the Board's conclusions with respect to the impact of an impasse in negotiations on multiemployer bargaining do not consider the practical effects of such an occurrence on the dynamics of group bargaining.

As set forth above, the Board has stated that, once negotiations have begun, a union may withdraw from multiemployer bargaining with respect to one or more employers, while continuing multiemployer bargaining with those employers remaining in the group. *Pacific Coast Association*, 163 NLRB 892 (1967); see also *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F. 2d 181, 183 (5th Cir. 1974); *NLRB* v. *Bonanno*, 630 F. 2d 25, 31 n. 10 (1st Cir. 1980) (P. 28). Such a policy unfairly tips the delicate balance existing in multiemployer bargaining in favor of a union and represents a significant departure from the Board's ostensible equality of withdrawal standard. By adopting such a policy the Board creates an imbalance of

economic weapons contrary to this Court's decision in *NLRB* v. *Brown*, 380 U.S. 278 (1965).[16]

This policy protects the interests of the union but is inequitable to employers. On the one hand, the Board sanctions the right of a union to, in effect, reject the existence of the multiemployer bargaining unit. On the other hand, however, the employer is held, without choice, to be bound by the results of the multiemployer bargaining. "The policy of the Board does tend to favor the union. The Board apparently sees these interim agreements as a legitimate bargaining weapon that the union may resort to without creating new withdrawal rights in the remaining employers, so long as the agreements are not so numerous that the multi-employer group becomes completely fragmented." Murphy, *Impasse and the Duty to Bargain in Good Faith,"* 39 U. Pitt. L. Rev. 1, 57-58 (1977).

The Board has characterized an impasse in bargaining as only a temporary "deadlock" or "hiatus" in negotiating. *Charles D. Bonanno Linen Service, Inc.*, 243 NLRB No. 140, slip op. at 4 (1979) (P. 41). It therefore concludes, *ipso facto*, that an impasse in bargaining is not an "unusual circumstance" within the meaning of the *Retail Associates* guideline.

The Board's characterization of an impasse in multiemployer bargaining patently ignores the realities on negotiations in this context. It is submitted that an impasse is indeed an "unusual circumstance" in multiemployer bargaining. The Board's limited definition of "unusual circumstance" improperly fails to give due consideration to the

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[16] In *Brown*, this Court concluded that the Labor Board should not be the " 'arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.' " 380 U.S. at 283.

effects of an impasse in the multiemployer context. In the context of bargaining between a single employer and union, an impasse may be, as the Board contends, only a "temporary deadlock" in negotiations in which each side may use economic force against the other. The union may engage in an economic strike or seek to involve consumers through the use of picketing or handbilling. The employer may hire replacements for its striking employees, or it may seek to transfer work to allies. But in virtually every confrontation of this kind it is the single employer versus the single union.

Conversely, in the multiemployer setting, the frustration of the impasse is exacerbated by the involvement of other competitor employers. The impasse is or may be between employer members of the multiemployer unit as a result of conflicting priorities, as much as between the unit collectively and the union. Moreover, a union's use of interim agreements (as sanctioned by the Board) seriously fractures the group and conflicts with the uniform approach to collective bargaining sought by employers in engaging in bargaining on a group basis. Therefore, once an impasse is reached, each individual employer is confronted not only with its own dispute with the union, but also with conflicting priorities held by other employer members of the multiemployer unit. In addition, the execution of separate agreements by the union whipsaws the remaining employer members, who must, under the Board's view, watch the strike end at competitors' businesses and sustain a competitive disadvantage as those competitors resume business operations. An employer, faced with this two-pronged dilemma, would nonetheless be required by the Board to remain in the multiemployer unit until such time as it is faced with "dire economic circumstances" which threaten its continued existence.

Recognizing the deleterious effects of an impasse on multiemployer bargaining and the Board's inadequate response

thereto, five circuit courts[17] have concluded that an impasse in multiemployer bargaining is in and of itself[18] an "unusual circumstance" thereby justifying unilateral withdrawal. The facts of the instant case are illustrative of the fallacy of the Board's impasse characterization. Thus, the parties reached an impasse in bargaining on May 15, 1975 (P. 56; J.A. 94, Jt. Ex. A, R. 16, 17). Subsequently, the Union engaged in a selective strike against Bonanno commencing on June 23, 1975 (P. 57; J.A. 94, Jt. Ex. A, R. 16, 17). Bonanno endured the continuing impasse for more than six months before effectuating its withdrawal from the Association (P. 58; J.A. 94-95, Jt. Ex. A, R. 16, 17). The impasse continued between the Union and the Association for almost five more months before a collective bargaining agreement was consummated (P. 59-60; J.A. 95, Jt. Ex. A, R. 16, 17). Thus the "temporary hiatus" occasioned by the impasse in bargaining had a duration of almost eleven months. Under these circumstances it

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[17] *NLRB* v. *Associated Shower Door Co., Inc.*, 512 F. 2d 230, 232 (9th Cir. 1975), *cert. denied*, 423 U.S. 893 (1975); *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F. 2d 181, 183-184 (5th Cir. 1974); *Fairmont Foods Co.* v. *NLRB*, 471 F. 2d 1170, 1172-1173, 1174 n.i.g. (8th Cir. 1972); *NLRB* v. *Beck Engraving Co.*, 522 F. 2d 475, 483 (3d Cir. 1975); *NLRB* v. *Independent Association of Steel Fabricators Inc.*, 582 F. 2d 135, 146 (2d Cir. 1978).

[18] The First Circuit asserted that "regardless of the propriety of the analytical approach adopted in *Hi-Way Billboards, Shower Door,* and *Steel Fabricators,* it is apparent that the three decisions hinged on the belief that the negotiation of individual agreements had unfairly tipped the balance of bargaining power, and not on any conviction that impasse alone justifies unilateral withdrawal." 630 F. 2d at 33. Contrary to the First Circuit's decision, none of the circuit court decisions have made the presence of interim agreements a condition precedent to an employer's withdrawal at impasse. See *NLRB* v. *Beck Engraving Co.*, 522 F. 2d 475, 482-483 (3d Cir. 1975); *H & D, Inc.* v. *NLRB*, — F. 2d —, —, 105 LRRM 3070, 3072 (9th Cir. 1980). The Board itself admitted as much in its Supplemental Decision in the instant case. *Charles D. Bonanno Linen Service, Inc.*, 243 NLRB No. 140, slip op. at 7 (P. 39-40, n.5).

cannot be reasonably claimed by the Board that the impasse was merely a temporary "hiatus" or "deadlock" which can be easily manipulated by either party. *Charles D. Bonanno Linen Service, Inc.*, 243 NLRB No. 140 (1979), slip op. at 4 (P. 41).

Under the Board's rationale, Bonanno would have been required to endure, without any viable alternative, an impasse of almost eleven months duration,[19] as well as the possibility that the separate meetings between the Union and individual members of the Association might result in separate agreements of potentially damaging effect. Under the circumstances the only equitable alternative available to Bonanno was withdrawal from group bargaining. To require Bonanno to continue as a member of the Association until such time as it could no longer continue as a viable business entity[20] would hardly be in keeping with our national labor policy of reducing "industrial strife" and providing peaceful resolution of labor disputes. 29 U.S.C. § 141.

The Board's conclusion that impasse does not constitute an "unusual circumstance" is further weakened by its authorization of separate interim agreements between a union and individual employer members of a multiemployer group.[21] The

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[19] That is, assuming that the impasse would have been broken at that time had Bonanno not removed itself from the group negotiation. It is, of course, not possible at this time to assess the effect of Bonanno's withdrawal on the bargaining climate and its impact on the logjam in negotiations which existed at that time.

[20] In effect, the Board would require Bonanno to face bankruptcy before being permitted to withdraw. Of what avail then would be the right of withdrawal?

[21] See, e.g., *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F. 2d 181, 183 (5th Cir. 1974); *NLRB* v. *Beck Engraving Co.*, 522 F. 2d 475, 482-483 (3d Cir. 1975); *NLRB* v. *Independent Association of Steel Fabricators*, 582 F. 2d 135, 147 (2d Cir. 1978); *NLRB* v. *Associated Shower Door Co.*, 512 F. 2d 230, 232 (9th Cir. 1975). Even the First Circuit below recognized the adverse impact of separate agreements on the stability of multiemployer bargaining. The court

Board has held that a union which is engaged in multiemployer negotiations may engender a *de facto* withdrawal from the multiemployer unit by entering into separate agreements with one or more members of the multiemployer group. At the same time the union can insist on bargaining with the remaining employers on a multiemployer basis.

Negotiation of such agreements, according to the Board, prevents significant fragmentation, rather than causes it, and tends to facilitate the breaking of an impasse (P. 51). However, the substantial injurious effect of separate agreements has been well recognized by the courts of appeals. The practical effect of separate agreements on the viability of the multiemployer group was described by one commentator as follows:[22]

> The ability to negotiate interim agreements with weaker members of the association results in a "whipsawing" of those members which the union refused to bargain with. These remaining employers have no parallel means of fragmenting the union[12] but are subject to being isolated and thus further pressured into acquiescing to the union in negotiations. . . .
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> While it is true that the interim agreements help break the negotiating logjam, they do so by increasing the pressure on the resisting employers, a tactic for which the employers, practically speaking, have no counterweight. In most cases, the employers not signing interim agree-

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stated that "[w]ithdrawal by unit members and their negotiation of separate contracts obviously would reduce the efficiency of the bargaining process." 630 F. 2d at 28.

[22] See also Hickey and Sauntry, *When Is Employer Justified In Leaving The Fold?* Legal Times of Washington, January 5, 1981 at 9-11:

> Under the board's rule, employers who have committed themselves to multi-employer bargaining must watch helplessly while the union picks off its weakest members, destroying the efficiency of multi-employer bargaining. As a practical mat-

ments will be those whose insistence on certain collective bargaining positions has actually resulted in impasse.

Negotiation of interim agreements, even if the signatories thereto are later to be bound by the final agreement, unduly pressures the remaining employers to accede to the union's demand since many times the interim agreements include concessions over and above those the non-signatories are willing to give. Additionally, the signatories of the interim agreements are producing or operating while the isolated members, competitors of the signatories, are still engaged in a work stoppage or labor dispute.

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[12] In fact even where the union is an association or conference board of locals, it would be an unfair labor practice for the employers to attempt to deal with the locals directly. *NLRB* v. *General Electric Company,* 418 F. 2d 736 (2d Cir. 1969). Levin and Jason, *Multiemployer Withdrawal Bid Short Circuited at the Impasse,* 2 National Law Journal No. 24, February 25, 1980 at 25.

Five circuit courts have concluded that the Board's policy is fundamentally inequitable. The courts have found that individual interim agreements have a substantial "whipsaw" effect on the remaining members of the multiemployer unit. Once interim agreements are signed, the multiemployer unit becomes significantly weakened and fragmented. *NLRB* v. *Associated Shower Door, supra.*

Moreover, the Board's suggestion that interim agreements further unit integrity (P. 51) ignores the realities of multiemployer bargaining. And while in many instances these agreements have the effect of breaking an impasse, it is

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ter, they are bound to a bargaining strategy developed on the understanding that they would present a united front to the union and may have made concessions at the bargaining table which might not have been made had the departing employers not been present.

submitted that such a result occurs because one or more employers have abandoned the multiemployer group. By striking separate deals these employers have diminished the strength of the multiemployer group. Further erosion of the group's resolve occurs when the remaining members see one or more competitors, who formerly were allied with them in the multiemployer group, resume their business operation, while they must contend with a continued work stoppage. It is this inequitable situation which the courts have sought to rectify by granting an employer an equivalent right to withdraw upon impasse.

The Board attempts to differentiate between interim agreements which contemplate adherence to a final association-wide contract, and separate agreements, which do not, contending that since signers of interim agreements retain a vested interest in the outcome of final union-association negotiations, the unit is neither fragmented nor significantly weakened (P. 48-49). It is submitted that such an analysis is superficial at best, representing a distinction without a difference. In each circumstance an employer is breaking away from the group to bargain individually with the union. In each instance the employer has struck out on its own, taking positions that are antithetical to those of the multiemployer group. The employer who signs the interim agreement receives immediate benefits that are denied to the remaining members of the multiemployer group who remain enmeshed in a labor dispute with the union. While it is true that employers who sign interim agreements become bound by the agreement ultimately negotiated, it is an inescapable conclusion that the practical effect of their independent actions is to significantly dilute the strength of the multiemployer unit. These employers in effect have, by signing interim agreements with the union, effected a *de facto* withdrawal from the multiemployer group. As the *Beck* court stated: "[A]llowing individual negotiations *even on an interim basis* is tanta-

mount to a rejection of the existence of the multi-employer bargaining unit." 522 F. 2d at 483 (emphasis added).

While there is evidence that the Union, prior to Bonanno's withdrawal, met secretly with two employer members of the Association "presumably in an effort to make a separate settlement" (P. 57), apparently no separate agreements were consummated. Despite the absence of any such agreements this Court is urged to adopt the "impasse doctrine" fashioned by the Second, Third, Fifth, Eighth and Ninth Circuit Courts of Appeals. As the Third Circuit stated in *NLRB* v. *Beck Engraving Co.*, 522 F. 2d 475, 483-484 (3d Cir. 1975),

> The employer's right to withdraw during an impasse cannot be made contingent upon the union's prior exercise of its right to negotiate individual interim agreements. *The rights of the parties should accrue simultaneously based upon the occurrence of an event which neither can manipulate (e.g., impasse).* Were the rule otherwise, the party whose right accrues first would be given a tremendous bargaining advantage and leverage. We recognize that, to some extent, basing the right of withdrawal upon the existence of an impasse rather than of individual negotiations contributes to instability within the context of multi-employer bargaining. Certainly, that is the result in this case. But we cannot avoid the conclusion that this additional incremental instability, however unfavorable to the policy aimed at stabilization of these units, is a necessary concomitant of ensuring that the parties have equal rights and that the existence and implementation of such rights do not grant unfair advantage to either party. (Emphasis added.)

None of the circuit court decisions require the actual execution of interim agreements as a requisite for finding that an impasse in bargaining justifies withdrawal (see footnote 18, *supra*). Accordingly, the absence of any evidence on the

record that interim agreements were entered into herein is immaterial.

In balancing the conflicting legitimate interests of employers and union participants in multiemployer bargaining, and in order to insure that the Board's stated policy of equalizing withdrawal rights of both parties in a multiemployer relationship, this Court should adopt the "impasse doctrine" fashioned by five circuit courts of appeals. Such a decision will have the salutary effect of insuring stability in collective bargaining.

It should be emphasized that multiemployer bargaining is based on consent of the parties. Once a withdrawal is effectuated, bargaining continues on an individualized basis and therefore the purposes of the National Labor Relations Act will continue to be promoted. Labor peace is better served by allowing withdrawals rather than by requiring inflexible adherence to a multiemployer unit long after meaningful collective bargaining within that framework has become nothing more than an exercise in futility.

Bonanno's withdrawal prompted an end to the lockout and subsequently the successful conclusion of an agreement between the Association and the Union. By so withdrawing, Bonanno did not seek to sever its bargaining relationship with the Union. Rather, Bonanno merely sought to meet its obligation under the Act to bargain in good faith on an individual basis. It is submitted that effectuation of collective bargaining would be better served by allowing withdrawal at impasse. The alternative propounded by the Board would frustrate meaningful collective bargaining because it requires an employer to remain indelibly tied to fruitless multiemployer bargaining long after the process of collective bargaining has ceased to function.

II. The Five Courts of Appeals Acted within Their Authority under the National Labor Relations Act and Decisions of This Court in Fashioning the "Impasse Doctrine."

While the decision of the First Circuit below seeks to distinguish the decisions of the five courts of appeals which have fashioned the "impasse doctrine," the court's decision to enforce the Board's order appears to be based upon its view that the Board's rationale is entitled to deference. The court stated:

> Congress "intended to leave to the Board's *specialized judgment* the inevitable questions concerning multi-employer bargaining [which are] bound to arise . . ." *Id.* at 96 [citing *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87 (1957)]. As a result, the Board's "balancing of the conflicting legitimate interests [is] subject to limited judicial review." *Id.* (footnote omitted). In the present case, we think the Board has struck a reasonable balance in concluding that impasse alone does not justify unilateral withdrawal. 630 F. 2d at 35 (P. 36) (emphasis added) (footnote omitted).

The First Circuit then, essentially concluded that the decision of the Board was entitled to approval out of deference to its presumed expertise. While it is true that judicial review is limited, see, *e.g.*, *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87, 96 (1957), that does "not mean that the balance struck by the Board is immune from judicial examination and reversal in proper cases." *Labor Board* v. *Brown*, 380 U.S. 278, 290-291 (1965).[23]

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[23] As noted above (p. 10, n.9, and pp. 11-13), the Board's position on the question of impasse has hardly been consistent, thus discounting any claim of expertise superior to that of the circuit courts in balancing the conflicting legitimate interests presented by the instant case.

Congress has mandated that the courts of appeals serve an important role in the development of our federal labor policy. 29 U.S.C. § 160(e) and (f). Under this framework the circuit courts are empowered to enforce, modify, or set aside orders of the Board. In defining the proper role of the courts in cases such as this, which involve a question of law, this Court in *Labor Board* v. *Brown*, 380 U.S. 278, 292 (1965) stated:[24]

> [W]here, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, "[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building Co.* v. *Labor Board, post*, at 318.
>
> Courts must, of course, set aside Board decisions which rest on an "erroneous legal foundation." *Labor Board* v. *Babcock & Wilcox Co., supra*, at 112-113. Congress has not given the Board untrammeled authority to catalogue which economic devices shall be deemed freighted with indicia of unlawful intent. *Labor Board* v. *Insurance Agents, supra*, at 498.

In the exercise of the mandate of Congress and this Court to give particular scrutiny to Board decisions which, as in this case, "balance conflicting interests" and rest on an "er-

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[24] As this Court held in *NLRB* v. *Weingarten*, 420 U.S. 251 (1975), in cases such as this which involve the balancing of conflicting interests, before the Board's decision is entitled to deference the Board must demonstrate that it "has reached a fair and reasoned balance upon a question within its special competence." *Id.* at 267. It is submitted that the Board's result in this case fails to achieve a reasonable balance of the "conflicting interests of labor and management" with respect to multiemployer bargaining. *Id.*

roneous legal foundation," five circuit courts have determined that an employer should be accorded a right to withdraw at impasse. Those decisions have logically concluded that a balancing of conflicting legitimate interests in the multiemployer bargaining context requires such a result. The Board in the instant case has failed to articulate any valid reason why these decisions are now untenable. Therefore, it is respectfully submitted that the "impasse doctrine" fashioned by five circuit courts (and initially given at least passing acceptance by the First Circuit) should now be adopted by this Court.

Conclusion.

For the reasons set forth above, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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